Supreme Court, U. S.
FILED
JUN 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1390

TOWN OF LOCKPORT, NEW YORK, and FLOYD SNYDER, Individually and as Supervisor of the Town of Lockport,
Appellants,

vs.

CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. and FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated,
Appellees,

and

JOHN J. GHEZZI, Secretary of State of the State of New York, ARTHUR LEVITT, Comptroller of the State of New York, LAVERNE S. GRAF, Clerk of the County Legislature, County of Niagara, New York and KENNETH COMERFORD, County Clerk, County of Niagara, New York,
Appellees.

APPEAL FROM A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION TO AFFIRM
AND
BRIEF OF APPELLEES, CITIZENS FOR COMMUNITY ACTION AT THE LOCAL LEVEL, INC. AND FRANCIS W. SHEDD, Individually and on Behalf of All Others Similarly Situated

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BATAVIA TIMES, APPELLATE COURT PRINTERS
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BATAVIA, N. Y. 14020
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Appellees.

MOTION TO AFFIRM

Appellees, Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd (hereinafter referred to as appellee CALL), pursuant to Rule 161(d) of the Rules of the Supreme Court of the United States, move to affirm the final judgment of the District Court on the ground that the decision of the District Court is so obviously correct under the principles established by this Court as to warrant no further review by this Court.

BRIEF OF APPELLEES

Opinion Below

The opinion of the District Court for the Western District of New York (Appendix A, *infra*, pp. 1a-17a) is reported at 386 F.Supp. 1.

Jurisdiction

The jurisdictional requisites are adequately set forth in the appellants' Jurisdictional Statement.

Constitutional and Statutory Provisions Involved

The Jurisdictional Statement sets forth the Constitutional and Statutory Provisions Involved.

Questions Presented

The following questions are presented on this appeal:

(1) Whether creation of dual voting units of unequal population within a single political subdivision of a state, consisting of the cities of a county and the areas outside of the cities, and the concomitant requirement of separate majorities in each unit for adoption in a county-wide referendum of a county charter form of local government, so dilutes and debases the rights of the county-wide majority as to violate the one man, one vote principle.

(2) Whether dismissal of a prior action brought in the federal court by the County of Niagara, purportedly on behalf of its citizens and voters, against the State of New York which raised substantially the same issues as raised herein, constitutes a bar to the instant class action under the doctrine of res judicata.

Statement of Case

The County in New York State is a general unit of local government. Article 9 of the New York Constitution, the local government article, which was adopted in 1963, contains a provision, Article 9, § 1(h)(1), for the adoption of an alternative form of county government, commonly known as a County Charter form, which primarily converts county government from a single branch legislative form of local government to an executive-legislative form. The provision applies to all areas of the State other than New York City and contains the proviso that no such form of government or amendment thereof shall become effective unless approved on a referendum by a majority of the votes cast in the area of the county outside the cities and in the cities of the county, if any, considered as one unit. On September 6, 1972, the Niagara County Legislature adopted a Niagara County Charter, the express purpose of which was the separation of the County Legislative and Executive functions and responsibilities; the securing of the greatest possible County Home Rule, and the accomplishment of increased efficiency, economy and responsibility in the Niagara County government. By the express terms of the Charter, no function, facility, duty or power of any city, town, village, school

district or other district was to be transferred, altered or impaired by the Charter (Appellee CALL's brief, Appendix A, pp. 11-13).

On November 7, 1972, the proposed Charter was voted upon by the voters of the entire geographical unit, the County of Niagara. It received a majority vote in the County as a whole but was not certified as the duly adopted government of Niagara County because it did not receive a separate majority vote in the towns of the County, the area of the County outside the cities, and thus was declared defeated.

The population of the cities of Niagara County as a unit is 147,026. The population of the area outside the cities is 88,694 (Amended Complaint, Exhibit B). In the 1972 referendum, a total of 55,393 votes were cast. 11,594 negative votes were cast in the towns of Niagara County, 20.93% of the total vote, which minority vote prevented the adoption of the Charter. Theoretically, by the dual majority requirement, one negative vote in the towns of the County could cancel out 147,026 affirmative votes in the cities of the County.

The original defendants have not appealed the judgment herein. Subsequent to his decision not to appeal the judgment of the three-judge District Court, the New York Secretary of State certified the 1972 Niagara County Charter and a County Charter placed on the ballot in the 1974 general election (while this action was pending in the District Court), which also received a majority vote of all the voters of Niagara County, but did not receive a separate majority vote of the voters in the area outside the cities.

ALTHOUGH THE PRECISE ISSUE HEREIN MAY NOT HAVE BEEN PREVIOUSLY DECIDED, THE DECISION OF THE THREE-JUDGE DISTRICT COURT ADOPTS ESTABLISHED LAW AND SHOULD BE AFFIRMED WITHOUT PLENARY CONSIDERATION.

I

The contention of the appellant that the right of the states to establish the form and structure of subordinate governments is not subject to the Fourteenth Amendment is not a correct statement of the established law.

The rule is stated in *Gomillion vs. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125 (1960); that the exercise of the power of the states to create forms and structures of local government is not insulated from federal judicial review when state power is used as an instrument for circumventing a federally protected right.

The appellant, in the Jurisdictional Statement, blends the sovereignty argument with the one man—one vote argument. He relies principally upon the statement that the determination of the form and structure of subordinate state government instrumentalities is a political matter over which the States have exclusive control. Such statement is not a correct statement of the law. The creation of forms or structures of municipal government is subject to the Equal Protection Clause. *Gomillion vs. Lightfoot, supra.* Once the state provides for the election of a local government official or agency, the constitutionally protected right to equal suffrage applies to such election. *Sailors vs. Board of Education of Kent County*, 387 U.S. 105, 87 S.Ct. 1549 (1967). The Constitution imposes one ground rule for the developmental arrangements of local

government; a requirement that units of local government with general governmental powers over an entire geographic area not be apportioned so as to violate the right of equal suffrage. *Avery vs. Midland County, Texas*, 390 U.S. 474, 88 S.Ct. 1114 (1968).

II

The secondary argument of the appellant that the one man--one vote principle does not apply to an election to determine the form or structure of a unit of local government with general governmental power is inconsistent with the line of cases on the subject in this Court.

It is established law in this Court that the nature of the election is irrelevant to the distribution of the voting franchise in regard to a unit of general government. *Reynolds vs. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964); *Cipriano vs. Houma*, 395 U.S. 701, 89 S.Ct. 1897 (1969); *City of Phoenix vs. Kolodziejski*, 399 U.S. 204, 90 S.Ct. 1990 (1970); *Gordon vs. Lance*, 403 U.S. 1, 91 S.Ct. 1889 (1971).

III

The state's classification of voters based upon their residence, a suspect classification, required that such classification meet the compelling state interest test. No evidence of the necessity or justification for the classification is offered in this case.

In the District Court and in the Jurisdictional Statement, it is alleged that the rural voters are primarily affected within the county unit of general government and therefore they have a special interest to be protected.

Gray vs. Sanders, 372 U.S. 368, 83 S.Ct. 801 (1963) declared that form of voter classification constitutionally defective.

Further, the defense is a matter of proof, that such classification is necessary to promote an articulated state goal in which the state has a compelling state interest. *Kramer vs. Union Free School District No. 15*, 395 U.S. 621, 89 S. Ct. 1886 (1969). There is no evidence in this case in support of such a defense.

IV

The concluding argument of the appellant, and really his only available argument, is that the classification of voters into city voters and town voters is a justifiable exercise of state action. Such classification is constitutionally defective.

In the two pages of the Jurisdictional Statement preceding that conclusion, the appellant alleges that the town voters have interests to protect against encroachment and diminution, that they have a direct stake in their existing town governments, that the proposed charter would have very material effects on existing local control of local matters and on the responsibility for and payment of various services (pp. 19-20, Juris. St.).

The appellant says that such protection against encroachment is also available to the city voters. But since the city voters approved the proposed charter, they obviously do not see the disadvantages alleged by the intervenor appellant.

First, the allegations of the appellant were not established in the District Court and are not a part of the record or papers on this appeal. There has been no evidence introduced of a compelling state interest, based upon an articulated state goal, which would justify the impingement upon the fundamental constitutional right of equal suffrage which is the defect of Article 9, § 1(h)(1) of the New York Constitution. In the absence of such evidence, the exclusionary classification of the separate voting units should be struck down *Kramer vs. Union Free School District No. 15, supra.*

Secondly, the allegation of encroachment and diminution of the powers and prerogatives of the towns, if the County Charter goes into effect, is refuted by the Charter itself which provides that no function, facility, duty or power of any city, town, village, school district or other district shall be transferred, altered or impaired by such Charter. (Amended complaint, Exhibit A, Abstract, Niagara County Charter, Article XXII, appellee's brief, Appendix A, p. 13).

Finally, the appellant concludes his argument that the urban voters of New York State have a vehicle for relief against town voters because 10.6 million people reside within the cities while 7.5 million live in the towns (Juris. St. P. 20). The statement is erroneous because approximately 8 million of those city dwellers in New York State live in New York City and Article 9, § 1(h)(1) of the New York Constitution does not apply to New York City. It only applies to counties not wholly contained in a city, thus excluding the five counties which comprise New York City (*McKinney's Consolidated Laws of New York, Book 2, Constitution, Article 9, § 1(h)(1), added 1963*).

In making such argument, he focuses on the urban-rural classification which is the root of the insidious discrimination implanted in this State constitutional provision. The United States Constitution does not recognize a city voter or a rural voter or a town voter. Only citizens cast votes.

V

The decision by the Court below that in the prior action Niagara County was not representing the class of aggrieved voters who bring this action is amply supported. However, the contention by the appellant that the aggrieved voters made no effort to preserve the original action is incorrect.

Before the time to appeal in the prior action, *County of Niagara vs. State of New York,* expired, the appellee voter, Francis W. Shedd, appeared personally before the Niagara County Legislature, advised such body, the present governing body of the County of Niagara, that he was appearing on behalf of the class of voters who had voted in favor of the proposed Niagara County Charter and requested, on behalf of such class of voters, that the Niagara County Legislature direct the Niagara County Attorney to file a notice of appeal to preserve the original action. The Niagara County Legislature refused to act favorably upon such request (Affidavit of J. J. Phelan, 8/3/73, motion to strike defense of collateral estoppel).

Conclusion

The decision of the three-judge District Court applied fundamental principles of equal suffrage to a state's classification of voters into voting units of unequal population, based upon place of residence, within the geographic area of a unit of local government having general governmental powers. There was no evidence in the case of the necessity or justification for the creation of such voting units within the geographic area in which the election franchise was granted.

The judgment of the District Court should be affirmed without plenary consideration.

Respectfully submitted,

WELLES V. MOOT, ESQ.,

and

JOHN J. PHELAN, ESQ.,

Attorneys for Appellees, Citizens for Community Action at the Local Level, Inc. and Francis W. Shedd, Individually and on Behalf of All Others Similarly Situated.

May, 1975.

APPENDIX A

Portion of Abstract of Proposed Charter for Niagara County

ARTICLE I—*Niagara County and Its Government*

Charter constitutes form of government for Niagara County. Purposes include "The separation of county legislative and executive functions; the securing of all possible county home rule; and the accomplishment of greater efficiency and responsibility in county government." Within limits prescribed by the County Law, Charter supersedes inconsistent provisions of other laws.

ARTICLE II—*Legislative Branch*

County Legislature continues as "the legislative, appropriating, governing and policy determining body of the county" with no change in numbers. The term of office of the members shall be four years. Local laws and ordinances are subject to veto by the County Executive; veto may be overriden by ⅔ vote.

Sums of money appropriated by any one or more items, or parts of items, or parts of item in any law or resolution appropriating money for the use of the county government or any agency or commission, are subject to veto by the County Executive; veto may be overriden by a majority vote.

ARTICLE III—*Executive Branch*

There shall be a County Executive who shall be elected from the County at large, and who shall at all times be a qualified elector of the County. He shall hold no other public office except as otherwise herein provided; shall give

his whole time to the duties of the office, and shall receive therefor a compensation as fixed by the County Legislature. His term of office shall begin with the first day of January, 1974, next following his election and shall be for four years. County Executive is chief executive and administrative head of county government. Provision is made for removal and designation of Acting County Executive. In the office of County Executive, there are six divisions: Budget, Purchase, Central Services, Research, Traffic Safety and Advisory Board, and Recreation and Related Programs, appointment of these Executive Division heads is also subject to confirmation.

ARTICLE IV—*Department of Audit and Control*

There shall be a department of audit and control headed by a comptroller who shall be elected from the county at large.

His term of office shall be for four years beginning with the first day of January next following his election. The provisions of this section with respect to such election shall not take effect until the general election of 1973 at which a comptroller shall be elected for a four year term to commence January 1, 1974, and every comptroller elected thereafter shall have a term of four years. At the time of his election and throughout his term of office he shall be a qualified elector of the county, shall devote his whole time to the duties of his office, and shall hold no other public office.

• • •

ARTICLE XXII—*Service Relationships*

No function, facility, duty or power of any city, town, village, school district or other district or of any officer thereof is or shall be transferred, altered or impaired by this charter or code. The County of Niagara shall have power to contract with any public corporation including but not limited to a municipal, district or public benefit corporation as defined in Section 3 of the General Corporation Law or with any public authority or combination of the same for the establishment, maintenance and operation of any facility and the rendering of any service which each of the contracting parties would have legal authority to establish, maintain, operate or render for itself. The costs and expenses incurred as well as charges for central facilities and administrative services relating thereto shall be borne proportionately by each such contracting party as agreed upon.